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Donald B. Verrilli, Jr.
Munger, Tolles & Olson LLP
1155 F Street NW, 7th Floor
Washington, D.C. 20004
(202) 220-1100

Lyle W. Cayce, Clerk of Court
U.S. Court of Appeals for the Fifth Circuit
600 S. Maestri Place
New Orleans, LA 70130-3408

Re: *State of Texas, et al. v. United States, et al.*, No. 19-10011

Dear Mr. Cayce:

On June 26, 2019, the Court directed the parties to address several issues relating primarily to whether appellate jurisdiction exists in this case. The answer is yes, most straightforwardly because both the Intervenor States and the Federal Defendants are injured by the decision below and both filed timely notices of appeal from that decision, and are pursuing their appeals. That the Department of Justice (DOJ) now refuses to defend the Affordable Care Act (Act) does not alter the analysis. That conclusion directly follows from *United States v. Windsor*, 570 U.S. 744 (2013), and *INS v. Chadha*, 462 U.S. 919 (1983), in which the Supreme Court upheld appellate jurisdiction in materially indistinguishable circumstances. Thus, there is no jurisdictional barrier to this Court's reversal of the decision below.

I. Both the Intervenor States and the House of Representatives Have Standing to Intervene, and Did So in a Timely Fashion.

Both the Intervenor States and the House of Representatives (House) have

standing to intervene, and their interventions were timely as to all issues and as to both orders of the district court.

A. The Intervenor States plainly have standing because they were injured by the decision below. The district court declared the Act invalid in toto—a decision that DOJ has acknowledged is the "functional equivalent" of an injunction. ROA.2722-24. That decision would (among other injuries) deprive the Intervenor States of hundreds of billions of dollars of federal funding. *See* ROA.240-43. A loss of "federal funds" is a "sufficiently concrete and imminent injury to satisfy Article III," and there can be "no dispute that a ruling in favor of" a party injured in that way "would redress that harm." *Dep't of Commerce v. New York*, 2019 WL 2619473, at *8 (U.S. June 27, 2019).

DOJ argues that the decision below does not apply to the Intervenor States because a declaratory judgment cannot "declare the rights of nonparties." DOJ Letter Br. 11. But having intervened at the outset, the Intervenor States are parties. *See Marcaida v. Rascoe*, 569 F.2d 828, 831 (5th Cir. 1978) ("[A]n intervenor is treated as if he were an original party …."). They are just as bound by the decision below as any other party, and are therefore injured by its preclusive effect. *See* 59 Am. Jur. 2d Parties § 224 (an intervenor "renders itself vulnerable to complete adjudication of the issues in litigation between itself and the adverse party"); *United States v. State of Ore.*, 657 F.2d 1009, 1014 (9th Cir. 1981) (Kennedy, J.)

(intervenors are "fully bound by all future court orders"). That injury is independently sufficient to provide standing to appeal. *Nat'l Presto Indus., Inc. v. Dazey Corp.*, 107 F.3d 1576, 1579 (Fed. Cir. 1997).

In any event, even if DOJ were correct about the scope of the judgment, the Intervenor States still have standing based on their likely loss of federal funding. The unstated premise of DOJ's argument is that the Federal Defendants would comply with the district court's judgment only in the Plaintiff States, and not in the Intervenor States. That result is inconceivable, given the overwhelming administrative burden (not to mention political outcry) that would result from enforcing the Act in only half of the country. Moreover, numerous provisions of the Act are not State-specific[1] and cannot be administered state by state. Given that, the "predictable effect" of the judgment is that the Federal Defendants will comply in *all* States, thus imposing an injury on the Intervenor States that is fairly traceable to the district court's judgment. *New York*, 2019 WL 2619473, at *8.

That is no doubt why DOJ has never before in this litigation suggested that the judgment would not affect the Intervenor States. When the Intervenor States moved to stay the judgment below, DOJ did not say that they lacked standing to do so because the district court's judgment would not affect them. To the contrary, DOJ

[1] *See, e.g.*, Pub L. No. 111-148, Tit. VII, Subtit. A, 124 Stat. 119 (2010) (enacting the Biologics Price Competition and Innovation Act of 2009); 42 U.S.C. § 1315a (establishing the Center for Medicare and Medicaid Innovation).

acquiesced in the stay precisely because the judgment "could affect millions of Americans and impact virtually every aspect of the American healthcare system." ROA.2723. In granting the stay, the district court accepted the Intervenor States' arguments about the "real-life impact" its decision would have in their States. ROA.2783. And when the district court entered its final judgment, it declared the Act wholly invalid—not just unenforceable in half of the country. ROA.2785. This Court should not accept DOJ's attempt to switch positions again.

B. The House's intervenor status is equally secure and need not be revisited by this Court. Because the Intervenor States have standing, the House need not have standing to intervene. And in any event, the House has standing to represent the Federal Government, and the House timely intervened.

1. "Article III does not require intervenors to independently possess standing" when an existing party possesses standing and seeks the same "ultimate relief" as the intervenor. *Ruiz v. Estelle*, 161 F.3d 814, 830 (5th Cir. 1998). That is true here: the Intervenor States are existing parties with standing to press their appeal, *see* pp. 2-4, *supra*, and the House seeks the same relief as the Intervenor States. Thus, the House need not possess Article III standing to intervene.

2. If the Court nevertheless reaches that issue, the House has its own standing to intervene on appeal. The federal government, like any other, has a cognizable "interest in the continued enforceability of its own statutes." *Maine v.*

Taylor, 477 U.S. 131, 137 (1986); *see Diamond v. Charles*, 476 U.S. 54, 62 (1986) ("[A] State has standing to defend the constitutionality of its statute."). To defend that interest, it has the power "to designate agents to represent it" in court—including by authorizing agents to litigate on its behalf "in a defined class of cases." *Virginia House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1951-52 (2019) (citation omitted). If the federal government has designated an agent "to represent its interests" in a particular case, and if the agent has "carried out that mission," the agent has standing to represent the federal government in court. *Id*. at 1951.

"Except as otherwise authorized by law," the "conduct of litigation" is "reserved" to DOJ by federal statute. 28 U.S.C. § 516. But there are exceptions. Congress has, for example, granted several agencies independent litigating authority. *See, e.g.*, 15 U.S.C. § 77t(b) (SEC); *id.* § 717s(a) (FERC). As a result, there are cases in which the federal government is represented solely by an entity other than DOJ, and still others in which the federal government is represented both by DOJ and another agency—even on opposite sides, *see, e.g., Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018); *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018).

Another exception applies here. The Supreme Court has "long held" that each House of Congress is a "proper party to defend the validity of a statute when an agency of government, as a defendant charged with enforcing the statute, agrees with plaintiffs that the statute is inapplicable or unconstitutional." *Chadha*, 462 U.S. at

940. Federal law recognizes that feature of our constitutional structure; it directs DOJ to inform Congress whenever DOJ refuses to defend the constitutionality of a federal statute, "within such time as will reasonably enable the House of Representatives and the Senate to take action, separately or jointly, to intervene in timely fashion in the proceeding." 28 U.S.C. § 530D(b)(2). That law is consistent with Supreme Court precedent and ensures that the House (or Senate, or both) may defend the constitutionality of duly enacted laws when DOJ refuses to do so.[2]

This case has proceeded along those carefully drawn lines. When the case was initially filed, DOJ served as the sole representative of the federal government, in keeping with its usual role. DOJ ultimately decided to contest, rather than defend, the constitutionality of the Act. DOJ therefore submitted a letter pursuant to Section 530D notifying the House of its decision.[3] When the 116th Congress was constituted, the House immediately resolved to "stand in" on behalf of the federal government and represent its interest in upholding the Act. *Bethune-Hill*, 139 S. Ct. at 1951. And that is precisely what the House is doing—defending the law in its capacity as a representative of the federal government, *see id*. at 1952, just as it has done in the Supreme Court and other courts on numerous similar occasions, *see*

[2] DOJ repeats the arguments it has already made in response to *Chadha*. *See* DOJ Letter Br. 9-10. Those arguments are still incorrect. *See* House Reply to Mot. to Intervene 5-6.
[3] Letter from Jefferson B. Sessions III, Attorney General, to Paul Ryan, Speaker (June 7, 2018), https://www.justice.gov/file/1069806/download.

House Mot. to Intervene 7-8 & nn.3-4 ("Motion").[4]

A holding that the House lacks standing in those circumstances would disturb that longstanding balance between co-equal branches and would invite severe harm to our constitutional structure. In many cases in which DOJ declines to defend a federal law, there will not be a party (like the Intervenor States here) that can assert a cognizable injury. The only parties available to step in and defend the law will be the Houses of Congress. But if they lack standing to do so, all litigation decisions in defense of the law will be left to DOJ, despite its decision not to defend the law. DOJ could choose not to appeal if a district court decides to enjoin the law—foreclosing any appellate review of the district court's decision. If our system worked that way—if it permitted the Executive Branch to "nullify Congress' enactment solely on its own initiative"—it would "pose[] grave challenges to the separation of powers." *Windsor*, 570 U.S. at 762.

3. The House's motion was timely as to all issues and as to both orders. The timeliness requirement is principally "a guard against prejudic[e]," such that

[4] Contrary to DOJ's argument (Letter Br. 7), the House has not asserted only "'institutional' harm." As DOJ recognizes (*id.*), the House's standing has not been litigated in this case because the House did not need to demonstrate standing to intervene. *See Ruiz*, 161 F.3d at 829-33. This letter is the House's first substantive discussion of its standing. The House has standing based on its authority to represent the United States' interest in defending the constitutionality of a federal law when DOJ refuses to do so. *Accord* Mot. to Intervene 3-13 (arguing for intervention based on *Chadha* and Section 530D as well as noting House's institutional interests). This Court therefore need not address *Bethune-Hill*'s discussion of limits on one house's ability to represent its institutional interests, as that discussion pertained to a legislative body that did *not* have authority to represent the State's interests.

"courts should allow intervention where no one would be hurt and greater justice could be attained." *Sierra Club v. Espy*, 18 F.3d 1202, 1205 (5th Cir. 1994) (citation and quotation marks omitted). The House moved to intervene in the district court on the first day that the 116th Congress could participate in this case, shortly after the entry of both district court orders. It moved to intervene in this Court on the same day the appeal was docketed. In neither court did the House's motion threaten to disturb the parties' briefing or otherwise alter ongoing proceedings. Indeed, despite opposing the House's motion as untimely, DOJ could not muster any reason why any party would be prejudiced by the House's intervention. *See* Opp. to Motion 16-17. Instead, DOJ focused solely on the length of time between the filing of suit and the House's motion. But in doing so, it not only ignored the overriding importance of prejudice in timeliness analysis, but also rested its argument on the mistaken premise that the 116th Congress can be faulted for what the 115th Congress chose not to do. That premise is contrary to the basic fact that the House is not a continuing body. *See* Motion 16-17; Reply to Motion 9-10.

Judge Southwick reviewed all of these arguments after full briefing on intervention, including on timeliness. *See* Motion 15-19; Opp. to Motion 16-17; Reply to Motion 9-10. And he resolved that issue, as well as the motion itself, in favor of the House. *See* Order on Motion 2 (explaining that, "[i]n the context of this case, the motion to intervene was not untimely," and stressing that "intervention will

not unduly delay or prejudice the rights of the original parties"); *see also New Orleans Pub. Serv., Inc. v. United Gas Pipe Line Co.*, 732 F.2d 452, 473 (5th Cir. 1984) (en banc).

The course of this appeal has confirmed the soundness of that decision. Judge Southwick granted the House's motion before briefing began—indeed, more than a month before the opening briefs were filed. The House's intervention did not prevent this Court from setting an expedited briefing schedule or from setting argument promptly thereafter. *See Ross v. Marshall*, 426 F.3d 745, 754 (5th Cir. 2005) (permitting intervention after district court judgment where it "did not interfere with the orderly processes of the court"). All of the parties have now briefed the case on that expedited schedule with full knowledge that the House would participate as a party in the appeal and defend the Act, yet none has alleged prejudice since the House was granted intervenor status. There has, in short, been no prejudice from the House's intervention—not to the Court, and not to the parties. And in all events, any such prejudice would have fully dissipated now that briefing is complete and the parties are on the eve of argument.

II. A Live Case or Controversy Exists Between the Plaintiffs and Federal Defendants, Notwithstanding DOJ's Refusal to Defend the Act.

Even if the Court were to reject all of the above arguments, there remains a live controversy between Plaintiffs and the Federal Defendants. Plaintiffs seek wholesale invalidation of the Act. The Federal Defendants are continuing to enforce

the Act and are therefore injured by the district court's decision. In precisely these circumstances, the Supreme Court has found a live controversy sufficient to support jurisdiction. *Windsor*, 570 U.S. at 754.

A. In *Windsor*, a taxpayer challenged the constitutionality of the Defense of Marriage Act (DOMA). While the suit was pending, DOJ changed position and began arguing that DOMA was unconstitutional. Critically, however, the Executive continued to enforce the statute pending a final determination of DOMA's constitutionality to "recogniz[e] the judiciary as the final arbiter of the constitutional claims raised." *Windsor*, 570 U.S. at 754. The district court held DOMA unconstitutional. Despite agreeing with that decision, DOJ filed a notice of appeal. The court of appeals exercised jurisdiction and affirmed. *Id*.

The Supreme Court held that it had appellate jurisdiction notwithstanding DOJ's agreement with the plaintiff's legal position. "[T]he United States retain[ed] a stake sufficient to support Article III jurisdiction on appeal," the Court explained, because the district court's order imposed a "real and immediate" injury on the United States. *Id.* at 757-58. In view of the Executive's continued enforcement of DOMA, the district court's decision "order[ed] the United States to pay money that it would not disburse but for the court's order." *Id.* at 758. The fact that DOJ may have "welcome[d] this order" did not "eliminate the injury." *Id*. The plaintiff's "ongoing claim for funds that the United States refuse[d] to pay thus establishe[d] a

controversy sufficient for Article III jurisdiction." *Id.*

That conclusion was consistent with *Chadha*. There, too, the Executive determined that a federal statute was unconstitutional and refused to defend it—but simultaneously continued to abide by it. The Court ruled that there was "adequate Art. III adverseness." 462 U.S. at 939. The Executive was "sufficiently aggrieved" by the court of appeals' decision holding the statute unconstitutional because that decision "prohibit[ed]" the Executive "from taking action it would otherwise take," namely, complying with the statute. *Id.* at 930. That was so "regardless of whether the agency welcomed the judgment." *Windsor*, 570 U.S. at 758.

Those decisions establish that a live controversy remains here. Plaintiffs seek, and the district court has ordered, wholesale invalidation of the Act. The Federal Defendants think that is the right outcome of this litigation (to some extent, *see* n.6, *infra*). But just as in *Windsor*, the Federal Defendants are continuing to enforce the Act pending a final judicial determination of the Act's validity.[5] DOJ Letter Br. 1, 4; ROA.2730-31. The district court's order holding the Act invalid in its entirety thus imposed "real and immediate" injuries on the United States. *Windsor*, 570 U.S. at 755. And because the Executive continues to enforce the Act notwithstanding its litigation position, its newfound agreement with Plaintiffs that the Act's provisions

[5] Dep't of Health and Human Services, *Statement from the Department of Health and Human Services on* Texas v. Azar (Dec. 17, 2018), https://www.hhs.gov/about/news/2018/12/17/statement-from-the-department-of-health-and-human-services-on-texas-v-azar.html.

are all inseverable from the mandate does not erode the controversy between the parties. In *Windsor*, DOJ and the plaintiff were in complete agreement on the proper resolution of the legal question at issue, yet the Court concluded that "the refusal of the Executive to provide the relief sought suffices to preserve a justiciable dispute as required by Article III." *Id.* at 759. So too here.[6]

B. DOJ's agreement with Plaintiffs also does not create any prudential barriers to appellate review. *Windsor* explained that any prudential concern about sufficient adversarial presentation of the issues is alleviated by the presence of a party or amicus arguing against the plaintiff and the government. *Id.* at 759-60. Indeed, the Supreme Court routinely adjudicates cases in which the Executive has changed positions and agrees with the other party, simply appointing an amicus to ensure adversarial presentation. *Id.* at 760. In fact, adversarial presentation was assured in both *Windsor* and *Chadha* by Congress's participation. *Windsor*, 570 U.S. at 761; *Chadha*, 462 U.S. at 940.

Here, adversarial presentation of the issues is guaranteed in the same way—by the participation of the House (to say nothing of the Intervenor States). Even if

[6] *Windsor* and *Chadha* establish that there is appellate jurisdiction here even assuming that Plaintiffs and DOJ are in complete agreement that the district court's judgment should be affirmed in full. But this Court also has jurisdiction for another reason: DOJ is *not* defending the entirety of the decision below. While Plaintiffs seek complete affirmance of the district court's judgment, DOJ argues here that the "relief awarded should be limited only to those provisions that actually injure the individual plaintiffs"—a remedy that the district would have to tailor "on remand." DOJ Br. 28-29. That divergence between the remedy that DOJ seeks and the remedy the district court provided plainly establishes appellate jurisdiction. *Accord* DOJ Letter Br. 5-6.

the Court were to conclude that the House is not a proper intervenor (as this Court's Question 2 asks the parties to assume arguendo), the Court could alleviate any prudential concerns by treating the House's brief as an amicus brief. *See Windsor*, 570 U.S. at 760. And if there were any remaining doubt as to the prudence of hearing this case, its nationwide importance would confirm the need to do so. *See id.* at 761.

III. If DOJ's Change in Position Has Mooted the Controversy and No Other Defendant Has Standing, the Court Should Vacate the Decision Below

Should this Court determine that it lacks appellate jurisdiction, it should vacate the district court's judgment. That is so for two reasons.

A. First, this Court should vacate the district court's decision because Plaintiffs lacked standing to bring this suit in the first place. *See* House Br. 20-35 (arguing that all Plaintiffs lack standing); House Reply Br. 9-19.

When an appellate court has concluded that it lacks appellate jurisdiction, the court must then "search the pleadings on core matters of federal-court adjudicatory authority" to assure itself of "the authority of the lower courts to proceed." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 73 (1997). If the appellate court concludes that the district court "lack[ed] jurisdiction," the appellate court may exercise "jurisdiction on appeal, not of the merits but merely for the purpose of correcting the error of the lower court in entertaining the suit." *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986) (citation omitted); *accord U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 21 (1994).

Even if this appeal is moot, then, this Court must determine whether the district court had jurisdiction to issue its judgment. This Court must therefore adjudicate the Plaintiffs' standing. Because Plaintiffs lacked standing, the Court must vacate the district court's decision.

B. Second, whether or not Plaintiffs have standing, this Court should vacate the district court's decision pursuant to *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950). Under *Munsingwear* and *U.S. Bancorp*, the vacatur question is an "equitable" one, and vacatur is proper where "a court concludes that the public interest would be served" thereby. *U.S. Bancorp*, 518 U.S. at 26, 29. When mootness is due to actions of "the party who prevailed below," vacatur is ordinarily appropriate; conversely, when mootness is due to the "party seeking relief from the judgment below," vacatur is ordinarily not appropriate. *Id*. at 24, 25.

The Court's Question 3 asks the parties to assume arguendo that DOJ's change in position has mooted the appeal. In other words, in light of the Executive's current agreement with the district court's judgment invalidating the Act in its entirety, the Executive (contrary to the argument above) is *not* injured by the judgment and has no concrete interest in overturning it. Should the Court conclude that the appeal is moot on that basis, it should treat DOJ as "the party who prevailed below" for purposes of the vacatur analysis. *Id*. at 25. *U.S. Bancorp*'s holding that vacatur is ordinarily appropriate when mootness is attributable to the party that prevailed

below rests on the recognition that vacatur is necessary to prevent that party from benefitting from a judgment that its own actions rendered unreviewable. That would be precisely the situation here: the government's change in position would have mooted an appeal of a judgment with which the government agreed, and that it was defending on appeal.

Even if this Court were to treat the government as the "party seeking relief from the judgment below" for purposes of the vacatur analysis, *U.S. Bancorp* holds that "exceptional circumstances" may justify vacatur even when mootness is attributable to the party seeking relief. 513 U.S. at 29; *accord Staley v. Harris Cty., Tex.*, 485 F.3d 305, 313 & n.4 (5th Cir. 2007) (en banc) ("public interest" may justify vacatur). There can be no question that exceptional circumstances are present here, and that the public interest compels vacatur. To leave the district court's order in place would be to countenance the invalidation of one of the most significant statutes in U.S. history without any opportunity for appellate review. That would be irreconcilable with the Judiciary's responsibility to ensure that "the exercise of the grave power of annulling an Act of Congress" is subject to searching appellate review. *United States v. Gainey*, 380 U.S. 63, 65 (1965).

CONCLUSION

The Court has appellate jurisdiction over this case. If the Court concludes otherwise, it should vacate the decision below.

Respectfully submitted,

/s/ *Donald B. Verrilli, Jr.*

Douglas N. Letter
General Counsel
OFFICE OF GENERAL COUNSEL
U.S. HOUSE OF REPRESENTATIVES
219 Cannon House Office Building
Washington, D.C. 20515
Tel: (202) 225-9700
Douglas.Letter@mail.house.gov

Donald B. Verrilli, Jr.
Elaine J. Goldenberg
Ginger D. Anders
Jonathan S. Meltzer
Rachel G. Miller-Ziegler
Jeremy S. Kreisberg
MUNGER, TOLLES & OLSON LLP
1155 F. Street N.W., 7th Floor
Washington, D.C. 20004-1361
Tel: (202) 220-1100
Fax: (202) 220-2300
Donald.Verrilli@mto.com

Elizabeth B. Wydra
Brianne J. Gorod
Brian R. Frazelle
Ashwin P. Phatak
CONSTITUTIONAL
ACCOUNTABILITY CENTER
1200 18th Street N.W., Suite 501
Washington, D.C. 20036-2513
Tel: (202) 296-6889
elizabeth@theusconstitution.org
brianne@theusconstitution.org

Counsel for the U.S. House of Representatives

CERTIFICATE OF SERVICE

I hereby certify that on July 5, 2019, the foregoing document was filed with the Clerk of the Court, using the CM/ECF system, causing it to be served on all counsel of record.

Respectfully submitted,

/s/ *Donald B. Verrilli, Jr.*
Donald B. Verrilli, Jr.

CERTIFICATE OF COMPLIANCE

1. This document complies with the page limit of this Court's June 26, 2019, briefing order because it does not exceed 15 pages.

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because the document has been prepared in a proportionally spaced typeface using Microsoft Word with 14 point, Times New Roman text and 12 point, Times New Roman footnotes, pursuant to 5th Cir. R. 32.1.

Respectfully submitted,

/s/ *Donald B. Verrilli, Jr.*
Donald B. Verrilli, Jr.